REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. E002 OF 2025

DANSTAN OMARI.....PLAINTIFF/RESPONDENT

-VERSUS-

NELSON HAVI ANDAYI.....DEFENDANT/APPLICANT

RULING

1. For determination is **Nelson Havi Andayi's** *(hereafter the Defendant/Applicant)* **motion dated 23/06/2025** brought pursuant to **Section 3, 3A, 5, 18 and 89 Civil Procedure Act (CPA), Section 7 of the Magistrates Court Act, Order 2 Rule 15(1)(b), Order 5 Rule 1(6), Order 10 Rule 11** of the **Civil Procedure Rules (CPR)** seeking the following orders-;

a. Spent.

b. That the Memorandum of Appearance dated 14/01/2025 together with all documents filed subsequent thereto in this suit by Osundwa & Company Advocates on behalf of the Defendant/Applicant be struck out.

c. That the entire proceedings herein commencing 27/01/2025 to 12/06/2025 in which Osundwa & Company Advocates appeared for the Defendant/Applicant be set aside.

d. That the request for interlocutory judgment against the

e. *Defendant/Applicant made by* **Danstan Omari** (hereafter the Plaintiff/Respondent) *on 12/06/2025 be struck out.*

f. *That the suit by the Plaintiff/Respondent be deemed to have abated for want of issuance and or service of summons to enter appearance upon the Defendant/Applicant on time or at all.*

g. *That in the alternative to prayer (d), the suit by the Plaintiff/Respondent before the High Court be withdrawn and transferred to the Chief Magistrate's Court at Milimani for trial or disposal.*

h. *That the costs of the application be paid by the Plaintiff/Respondent.*

2. The motion is premised on grounds found at the supporting affidavit sworn by Nelson Havi, on even date. The crux of his deposition is that the Plaintiff's suit has since abated due to the fact that no summons to enter appearance were ever extracted and or served alongside the plaint as required by Order 5 Rule 1(6) of the CPR. That having been served with a motion alongside a plaint and having intimated an interest in compromising the said motion, despite requests the Plaintiff's counsel to be served with said summons to enter appearance, the Plaintiff has failed to do so, therefore the suit is incompetent as having abated for want of issuance and service of summons.

3. He goes on to depose that he has never instructed the firm of Osundwa & Co. Advocates to act for him in the matter, file any

representation or pleadings whereas the suit as filed falls within the pecuniary jurisdiction of the Magistrates Court's thus ought

4. to be heard before the said Court. He concludes by deposing there is evidence of abuse of the process of the Court in the manner the Plaintiff has proceeded with the matter in his absence therefore his motion ought to be allowed as prayed.

5. The **Plaintiff** opposes the motion by way of a **replying affidavit sworn on 26/06/2025**. He assails the motion by deposing that, a day after filing the suit and accompanying motion, the firm of **Osundwa & Co. Advocates** entered appearance on behalf of the Defendant and subsequently filed pleadings in opposition to the motion. Later vide a letter dated 10/02/2025, the aforestated firm expressed their intention to compromise the motion whereafter the firm of **Havi & Co. Advocates** equally sought to engage his counsel on a compromise of the motion while equally filing a Notice of Appointment. That in light of the above, it is incontrovertible that both parties have actively participated in these proceedings, hence any assertion to the contrary is mischievous.

6. He goes on to state that the Defendant's participation in the matter through correspondence, sustained acts of defamation even in the face of binding injunctive orders, renders any claim of injustice on the backdrop of failure to serve summons to enter appearance specious. That in any event, by dint of the Defendant's actions, the purpose of summons is spent or

considerably diminished and any defect in summons must be considered as having been waived or acquiesced.

7. He further states that on the premise of **Article 165** of the **Constitution**, this Court's jurisdiction is unassailable. That in any event, the power to strike out pleadings must be exercised with great circumspection whereas the Defendant's motion does not meet the threshold to warrant striking out of the suit. He concludes by deposing that the Defendant has yet to file a defence since institution of the suit therefore the motion ought to be dismissed for being an abuse of the process of the Court and an attempt to exploit procedural opportunism.

8. Parties took directions on disposal of the Defendant's motion, by way of written submission. The respective parties duly complied, and the Court has duly considered the rival affidavit material and submissions. Having set out the above the Court postulates for determination the following **Issues -:**

a) Whether the suit by the Plaintiff can be deemed to have abated for want of issuance and or service of summons to enter appearance?

b) Whether the documents and pleadings filed by M/S Osundwa & Co. Advocates on behalf of the Defendant ought to be struck out and the proceedings in which Osundwa & Co. Advocates appeared for the Defendant set aside?

c) ***Whether the interlocutory judgment against the Defendant requested by the Plaintiff on 12/06/2025 ought to be struck out?***

d) ***Whether the suit by the Defendant before this Court ought to be withdrawn and transferred to the lower Court for trial and disposal.***

e) ***Who ought to bear the costs of the motion.***

Whether the suit by the Plaintiff can be deemed to have abated for want of issuance and or service of summons to enter appearance?

9. Concerning the above issue, a finding in the affirmative on the same would invariably put to rest the issue(s) identified for consideration. As such, the Court deems it prudent to address itself on the same before canvassing the other issues.

10. By the Defendant's affidavit material, whose kernel, the Court had earlier set out in this ruling, the latter has sought to have the Court arrive at a determination that the Plaintiff's suit has abated for want of issuance of summons. In opposition to the motion, the Plaintiff has vehemently challenged the Defendant's assertion on abatement by arguing that on the premise of the Defendant's conduct, the purpose of summons is spent or considerably diminished and any defect in summons must be considered as having been waived or acquiesced.

11. To the foregoing end, **Order 5 Rule 1** of the **CPR** provides that-;

(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.

(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.

(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.

12. My understanding of **Order 5 Rule 1(1)** of the **CPR**, is that upon filing a suit, a party ought to take out summons to enter appearance which should be served upon the defendant, ordering him to appear within a time specified in the summons. **Order 5 Rule 1(6)** of the **CPR**, on which the present issue for consideration is anchored on, provides for the duration within which every summon, other than where the Court is to effect service, ought to be collected for service within 30 days of issue.

13. With the foregoing in reserve, there are replete decisions both from this Court and Court of Appeal as concerns the purport of **Order 5 Rule 6(1)** of the **CPR**. That said, from my reading and understanding of decisions emanating from the Court of Appeal, the position appears to have since been distilled.

14. The Defendant while calling to aid the decisions in **Grace Wairimu Mungai v Catherine Njambi Muya [2014] KEELC 538 (KLR)** and **Misnak International (UK) Limited v 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 others [2019] KECA 471 (KLR)** summarily submitted that the Plaintiff's claim abated for want of issuance and service of summons to enter appearance.

15. On the part of the Plaintiff counsel cited the decisions in **Nanjibhai Prabhudas & Co Ltd v Standard Bank Ltd [1968] EA 670, Kabathi t/a Kabathi & Co Adv v Muhoro & Another [2023] KEELRC 333 (KLR), Amina Hersi Moghe & 2 Others v Diamond Trust Bank [2021] KEHC 4303 (KLR), Yooshin Engineering Corp v AIA Architects Ltd [2023] KECA 872 (KLR), Equatorial Commercial Bank Ltd v Mohansons (K) Ltd [2012] KECA 165 (KLR)** and **Patrick Omondi Opiyo t/a Dallas Pub v Shaban Keah & Another [2018] KECA 545 (KLR), to posit that the firm of Osundwa & Co.** Advocates having entered appearance for the Defendant, filed grounds of opposition to the Plaintiff's motion, meanwhile attended to multiple mentions, further having initiated a consent to compromise the interlocutory application, the aforestated were

hallmarks of knowledge, engagement and participation in the suit, to wit, the purpose of summons was spent and diminished.

16. It was equally argued that the Defendant has failed to identify any prejudice, let alone that which cannot be compensated by an award of costs, to warrant the suit being deemed incompetent for want of summons. Therefore, the Court was urged to hold that the purpose of summons had been fully achieved, and any alleged non-adherence, is at most, a curable irregularity that has been waived by the Defendant's participation, and no prejudice is shown; and that the suit has not abated and cannot abate on the basis as stated.

17. With the above in reserve, concerning the objective underlying the requirement of service of summons to enter appearance the Court of Appeal **in Patrick Omondi Opiyo t/a Dallas Pub (supra) stated that; -**

> *".....As stated earlier, the purpose of summons along with the plaint or other pleading is to notify the sued party that a suit has been filed against them and that they are required to file their defence within a particular time frame failing which the other party would be at liberty to request for judgment in default of filing a defence***.**
>
> *19. Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud……."*

See also; - **Equatorial Commercial Bank Limited (supra)**

18. The Court of Appeal in the case Misnak International (UK) Limited (supra) in concurring with the decision of **Aburili J in Law Society of Kenya v Martin Day & 3 others [2015] KEHC 1336 (KLR) adopted the sentiments of the leaned Judge as follows-;**

> *"It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked."*

19. Here, it is best to qualify that the latter decisions **Misnak International (UK) Limited (supra) and Law Society of Kenya (supra)** appertained summons against foreign defendants, with the ratio emanating therefrom being that knowledge of the suit was not sufficient unless the defendant was prompted by summons towards invoking the jurisdiction of the Court.

20. That said, as to the purport of **Order 5 Rule 1(6) of the CPR** with particular nexus to the facts of the matter presently before this Court, the same was recently discussed by the Court of

Appeal in **Diamond Trust Bank Kenya Limited v Maingi & Another [2023] KECA 712 (KLR) wherein it was observed that; -**

> *"29. The provisions of Order 5 rule 1 are elaborate. Service of summons upon a defendant is a pre-requisite to entering of appearance and defence of a suit. It is the responsibility of the plaintiff or his advocate to prepare the summons and file them together with the plaint. The summons are then signed by a judge or an officer appointed by the judge, and are to be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate. These provisions are, in our view, couched inmandatory terms. The defendant's invitation to defend a suit arises only upon proper service of summons, failing which a defendant may seek to have the suit dismissed for want of service of summons.*
>
> *30. ……*
>
> *The Court in the above-cited decision, while further addressing a situation where service of summons is disputed and abatement of the suit is asserted after the Defendant enters appearance and files a defence to the suit. The Court observed that; -*
>
> *"32……*
>
> *33. Upon service of the plaint and the application dated 5th November 2009, the appellant instructed an advocate, who filed a Notice of Appointment of Advocates and affidavits in response to the application by the 1st respondent. Subsequently, having been served with the amended Plaint, the appellant instructed its advocate to come on*

record on its behalf. The appellant also filed a Statement of Defence, List of Witnesses and a Notice of Claim against the 2nd respondent. The logical conclusion to be made from the said events is that the appellant was made aware and/or was at all times aware of the suit by the 1st respondent, non-service of summons to enter appearance notwithstanding.

34.The appellant did not enter a conditional appearance and/or file defence "under protest". The appellant, in our view, waived the requirement of service of summons and/or acquiesced to the non-service of the same. The appellant's active participation as far as the 1st respondent's application dated 5th November 2009 is concerned could only be construed to mean that it was fully informed of the suit against it and was ready to proceed with the same.

35. In ***Industrial and Commercial Development Corporation v Sum Model Industries Limited [2007] eKLR****, the Court held:"…whether or not a valid summons to enter appearance was served on the appellant does not, on the facts and circumstances of this case, vitiate the proceedings subsequent to such service. The appellant without any hesitation or protestation filed a written statement of defence and participated in the proceedings of the case without any complaint.*

36. It is our considered view that, where a defendant has entered appearance or appointed counsel, and has proceeded to file a defence to the suit without protest, the purpose of the summons is spent or considerably

diminished, and that any defect in the summons must be *considered as having been waived or acquiesced by the defendant. Subsequently, the defendant cannot be heard to complain about delay or failure by the plaintiff to serve summons to enter appearance. It is vain pedantry to do so. [emphasis mine]*

21. Here, a cursory perusal of the record, there is no indication whether the Plaintiff upon filling suit took out summons to enter appearance. Further, from the affidavit of service on record by one Jane Ann Onyango dated 15/01/2025, the Plaintiff served upon the firm of Havi & Co. Advocates, a copy of this Court's order issued on 14/01/2025, to wit, the plaint & accompanying documents and his application dated 13/01/2025. Subsequently on 15/01/2025, an amended Plaint and verifying affidavit was served upon the firm of **Osundwa & Co. Advocates**, believably on the backdrop of a Memorandum of Appearance having been filed by the latter firm on 14/01/2025. Whereafter, on 27/01/2025, the above firm filed Grounds of Opposition to the Plaintiff's motion.

22. By his affidavit material, the Defendant purports that he has never instructed the firm of Osundwa & Co. Advocates to act for him in the matter, file any representation or pleadings, to wit, he has sought as part of his reliefs that *the Memorandum of Appearance dated 14/01/2025 together with all documents filed subsequent thereto in this suit by Osundwa & Company Advocates on behalf of the Defendant be struck out* and *the entire proceedings herein commencing 27/01/2025 to 12/06/2025 in*

which Osundwa & Company Advocates appeared for the Defendant/Applicant be set aside. Further, the Defendant purports that on 23/01/2025 he filed a Notice of Appointment of Advocates by the firm of **Havi & Co. Advocates (Annexure NH-1).**

23. Thus on the premise of the forestated, a pertinent question comes to fore concerning the competency of the Defendant's motion presently for consideration.

24. The Plaintiff has argued in his response that from the Case Tracking System (CTS), at all material times relevant, the firm **Osundwa & Co. Advocates** was the firm on record on behalf of the Defendant, to wit, any overtures by the firm of **Havi & Co. Advocates** regarding a compromise of the Defendant's motion, were regarded as irregular and declined.

25. While the Defendant has made heavy weather of the fact that he did not instruct the firm of **Osundwa & Co. Advocates** to come on record on its behalf, I am inclined to agree with the Plaintiff's submissions that it is highly unlikely that the latter firm would enter appearance in the matter without being formally instructed.

26. Whereas, if it was the Defendant's case that he did not instruct the latter firm the burden of proof and or onus was on him to discharge the said burden, either by protest letter from the Defendant to the said firm; or calling the said proprietor of the said firm to render testimony on oath concerning whether he was duly instructed to act in the matter; or a letter from the said

firm stating that it was not instructed to act for the Defendant. Obviously, neither of the above or otherwise was placed before the Court for consideration.

27. As to the question of burden of proof, the Supreme Court in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR** addressed itself regarding the question of legal and evidential burden that:-

> *"The person who makes an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof, which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue".*

28. Here, the Defendant has failed to discharge his evidential burden, with respect to want of instructions to the firm of **Osundwa & Co. Advocates** to act in the matter, and now cannot be heard without more, that he did not instruct the said firm of advocates to come on record on his behalf. And as a consequence without prompt, the latter raises the question concerning the competency of the Defendant's motion.

29. As can be gleaned from the record and CTS, at all material times, the firm of **Osundwa & Co. Advocates were** on record on

behalf of the Defendant. It is only on 23/06/2025 that the Defendant lodged the instant motion for determination vide the **Havi & Co. Advocates,** whereas there is no indication or material from the record or CTS that the latter firm filed a Notice of Change of Advocates or Notice of Appointment of Advocate as purported in Paragraph 11 of the Defendant's affidavit in support of the motion to come on record in place of **Osundwa & Co. Advocates.**

30. Decisions on competency of pleadings filed by a firm of advocates not properly on record are replete within our jurisdiction. That said, the basis of the latter is codified in **Order 9 Rule 5** of the **CPR** which provides-;

> *A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.*

31. Whereas **Rule 6** of the same **Order** states that-;

> *The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the*

notice has been duly filed in the appropriate court (naming it).

32. Discussing the above provisions, this Court associates itself with the words of **Kemei, J.** in **Stephen Mwangi Kimote v Murata Sacco Society [2018] eKLR** wherein she stated that -;

"Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties."

33. Recently, the Court of Appeal in **Gituro v Maki & 3 others [2024] KECA 1204 (KLR)** while addressing itself to the said provision pithily observed that: -

"It is true that courts, and, in particular, this Court has a policy preference for determining matters on their merits where possible. It is also true, however, that that policy preference is not license writ-large for litigants to ignore well-established rules of the game – especially where those rules serve substantive policy goals. As this Court has recently stated, the rule stipulated in Order 9 Rule 9 of the Civil Procedure Rules has substantive and sound policy rationale: to protect an advocate from a litigant who may choose to avoid paying legal fees by instructing another advocate. It also has an inbuilt protection for the litigant against an unreasonable advocate by allowing the court to give leave – of course, subject to the conditions that the court places. (See Municipal Council of Kisumu v Gulf

Fabricators Limited & Another (Kisumu Civ. Application No. E103 of 2023). It is, therefore, not enough for the 1st and 2nd respondents to ponderously cite Article 159(2) (c). It behooved them to demonstrate that the deficiency in adhering to the rules of procedure were merely technical. They failed to do so. Indeed, as we have shown, the rule they failed to comply with serves a substantive goal and is not merely formalistic. ……The cumulative impact of these defects is to render the appeal still-born.

34. Premised on the above, can this Court proceed to deliberate on the Defendant's motion in light of the procedural inadequacy as identified, I believe not. While the Court has an obligation to adjudicate over the substantive issues presented before it, procedural requirements cannot be ignored.

35. Consequently, it would be moot to render a determination on the matter of want of summons in the suit on the premises of the latter finding. In the end, the Defendant's motion is struck out with costs.

Orders accordingly.

Delivered Dated and Signed at Nairobi this 12Th day of February, 2026.

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JANET MULWA.

JUDGE